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## State v. Paoli Respondent's Brief Dckt. 44038

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO,	)	
	)	No. 44038
Plaintiff-Respondent,	)	
	)	Cassia County Case No.
v.	)	CR-2015-976
	)	
TREVOR VON PAOLI,	)	
	)	
Defendant-Appellant.	)	
_____	)	

**BRIEF OF RESPONDENT**

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF CASSIA**

**HONORABLE BLAINE P. CANNON, Magistrate Judge  
HONORABLE MICHAEL R. CRABTREE, District Judge**

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## STATEMENT OF THE CASE

### Nature Of The Case

Trevor Von Paoli appeals from the district court's intermediate appellate decision that affirmed his conviction for domestic battery and destruction of a telecommunications instrument. On appeal, Paoli challenges the magistrate's denial of a self-defense instruction and the magistrate's evidentiary rulings related to the 911 call and body camera footage. Paoli also argues that his trial counsel was ineffective.

### Statement Of Facts And Course Of Proceedings

The state charged Paoli with domestic battery against Dena Clemons and with destruction of a telecommunications instrument. (R., pp.7-8.) The jury found Paoli guilty of both offenses. (R., p.90.) Paoli filed a motion for a new trial, claiming his attorney was ineffective, the jury was biased, and the judge should have recused himself. (R., pp.117-118.) The court subsequently granted defense counsel's motion to withdraw, denied Paoli's motion for a new trial, and imposed consecutive 180-day sentences, with 175 days suspended, and placed Paoli on probation. (R., pp.119, 121, 123-126.) Paoli filed a timely notice of appeal to the district court. (R., p.129.)

On intermediate appeal, Paoli raised four issues: (1) error in the failure to give a self-defense instruction; (2) error in "admitting the Audio/Video recorded by Officer Rose"; (3) error "in admitting the audio of the 911 call"; and (4) ineffective assistance of trial counsel. (R., p.190 (capitalization original).) The

district court denied relief. (R., pp.221-230.) Paoli timely appealed to this Court.  
(R., pp.233-234.)

## ISSUES

Paoli states the issues on appeal as:

1. Did the trial court err in failing to give a jury instruction on self defense?
2. Did the Trial Court err in admitting the Audio/Video recorded by Officer Rose?
3. Did the Trial Court err in admitting the audio of the 911 call?
4. Did the Appellant's trial counsel provide ineffective assistance of counsel?

(Brief of Appellant ("Appellant's Brief"), p.1 (capitalization original).)

The state rephrases the issues as:

1. Has Paoli failed to identify any error in the district court's decision affirming the magistrate's denial of a self-defense instruction?
2. Has Paoli failed to identify any error in the district court's decision affirming the magistrate's challenged evidentiary rulings?
3. Has Paoli failed to articulate any basis for finding error in the district court's refusal to consider Paoli's ineffective assistance of counsel claim, which Paoli raised for the first time on appeal?



## ARGUMENT

### I.

#### Paoli Has Failed To Show Any Error In The District Court's Decision Affirming The Magistrate's Refusal To Give A Self-Defense Instruction

##### A. Introduction

Paoli contends the trial court erred in failing to give a self-defense instruction, arguing that Ms. Clemons' testimony that "she pushed first" and Paoli "was just trying to get away," constituted "some evidence" justifying such an instruction. (Appellant's Brief, p.2.) The district court rejected this argument. (R., pp.223-226.) Paoli has offered no argument explaining why the *district court* erred, nor has he included a copy of the trial transcript in the record on appeal. As such, he has provided no basis for this Court to reverse the district court's decision.

##### B. Standard Of Review

On review of a decision rendered by a district court in its intermediate appellate capacity, the reviewing court "directly review[s] the district court's decision." State v. DeWitt, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008) (citing Losser v. Bradstreet, 145 Idaho 670, 183 P.3d 758 (2008)). The appellate court "examine[s] the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings." Id. "If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, [the appellate court] affirm[s] the district court's decision as a matter of procedure." Id. (citing Losser, 145

Idaho 670, 183 P.3d 758; Nicholls v. Blaser, 102 Idaho 559, 633 P.2d 1137 (1981)).<sup>1</sup>

Jury instruction claims are questions of law over which the appellate court exercises free review. State v. Gleason, 123 Idaho 62, 65, 844 P.2d 691, 694 (1992). A defendant is not entitled to a jury instruction that is an erroneous statement of the law, is not supported by the evidence, is an impermissible comment on the evidence or is adequately covered by other instructions. State v. Johns, 112 Idaho 873, 881, 736 P.2d 1327, 1335 (1987). Whether a reasonable view of the evidence supports an instruction is a matter within the trial court's discretion. State v. Bush, 131 Idaho 22, 32, 951 P.2d 1249 (1997).

C. Paoli Has Failed To Show Any Error In The District Court's Decision Affirming The Magistrate's Denial Of Paoli's Request For A Self-Defense Instruction

On intermediate appeal, Paoli claimed error in the magistrate's denial of his request for a self-defense instruction asserting, as he does on this appeal, that such an instruction was appropriate because Ms. Clemons purportedly testified that "she pushed first" and Paoli "was just trying to get away." (R., pp.191-192; Appellant's Brief, pp.2-3.) The district court rejected this argument, stating that, "[c]ontrary to Mr. Paoli's arguments on appeal, Ms. Clemons did not testify that she pushed Mr. Paoli first or that Mr. Paoli was just trying to get away." (R., p.225.) Rather, "Ms. Clemons testified that the altercation with Mr. Paoli involved yelling, pushing, and shoving on both sides," and "that Mr. Paoli

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<sup>1</sup> This standard of review governing appeals from the district court applies to all of Paoli's claims, but the standard will not be repeated in later sections.

kicked her without contacting her completely, pulled her from her car as she was attempting to get into it, and attempted to take her cell phone away from her.” (R., p.225.) The district court also quoted specific testimony from Ms. Clemons in which she testified about the “shoving that occurred,” explaining: “Shoving. I pushed him. He pushed me back and forth. There was yelling, name calling.” (R., p.225 (quoting “Trial Tr. 75:25-76:3”).) The district court also quoted Ms. Clemons’ testimony on cross-examination that she did not remember if she hit or touched Paoli first. (R., p.225 (quoting “Trial Tr. 85:15-22”).)

The district court noted the magistrate’s finding “that although both Ms. Clemons and Mr. Paoli pushed and shoved each other, there was no evidence that Ms. Clemons hit Mr. Paoli first.” (R., p.225.) The district court also cited the magistrate’s finding that “Mr. Paoli was more aggressive than Ms. Clemons,” relying on “Ms. Clemons’ testimony regarding Mr. Paoli pulling her out of her car when she attempted to get back into it.” (R., pp.225-226.) After reviewing the testimony and the magistrate’s ruling, the district court affirmed the magistrate’s decision denying Paoli’s request for a self-defense instruction.

On this appeal, Paoli does not articulate any basis for concluding the district court erred. In fact, Paoli continues to frame his argument as trial court error (Appellant’s Brief, pp.2-3), as opposed to the proper standard, which requires review of the district court’s decision. DeWitt, supra. Moreover, Paoli has failed to include the trial transcript in the record on appeal, depriving this Court of an adequate record even under the appropriate standard. It is axiomatic that the appellant bears the burden of providing a sufficient record on

appeal to substantiate his or her appellate claims. State v. Beason, 119 Idaho 103, 105, 803 P.2d 1009, 1011 (Ct. App. 1991). “In the absence of an adequate record on appeal to support the appellant’s claims, [the appellate court] will not presume error.” State v. Richmond, 137 Idaho 35, 38, 43 P.3d 794, 797 (Ct. App. 2002) (citing Beason, 119 Idaho at 105, 803 P.2d at 1011). To the contrary, any missing portions of the record are presumed to support the actions of the court below. State v. Repici, 122 Idaho 538, 541, 835 P.2d 1349, 1352 (Ct. App. 1992).

Having failed to articulate any error by the district court and having failed to provide the trial transcript, which provides the factual basis for Paoli’s instructional error claim, Paoli has failed to demonstrate error in the district court’s intermediate appellate decision affirming the magistrate’s denial of a self-defense instruction. See Murray v. State, 156 Idaho 159, 168, 321 P.3d 709, 718 (2014) (quoting State v. Zichko, 129 Idaho 259, 263, 923 P.3d 966, 970 (1996)) (noting an issue will not be considered if “either authority or argument is lacking” and declining to consider appellant’s claim because he failed to “provide[] a single authority or legal proposition to support his argument”); Fritts v. Liddle & Moeller Const., Inc., 144 Idaho 171, 174, 158 P.3d 947, 950 (2007) (presuming evidence supported lower court’s decision where petitioner failed to provide an adequate record for review of fact-dependent claims).

## II.

### Paoli Has Failed To Show Any Error In The District Court's Decision Affirming The Magistrate's Challenged Evidentiary Rulings

#### A. Introduction

Paoli contends the trial court erred in admitting the “body cam video” and the “audio recording of the 911 call.” (Appellant’s Brief, pp.3-5.) The district court rejected both of these arguments. (R., pp.226-229.) Paoli has offered no argument explaining why the *district court* erred, nor has he included a copy of the trial transcript in the record on appeal. Paoli has also failed to challenge one of the grounds on which the magistrate admitted the 911 call. As such, he has provided no basis for this Court to reverse the district court’s decision.

#### B. Standard Of Review

The trial court has broad discretion in the admission of evidence, and its judgment will be reversed only when there has been a clear abuse of discretion. State v. Perry, 150 Idaho 209, 218, 245 P.3d 961, 970 (2010) (citations omitted).

#### C. Paoli Has Failed To Show Any Error In The District Court's Decision Affirming The Magistrate's Challenged Evidentiary Rulings

On intermediate appeal, Paoli claimed error in the magistrate’s admission of “the body cam video” (Exhibit 19), and the “audio recording of the 911 call” (Exhibit 20). (R., pp.192-195.) The district court rejected both of these arguments. (R., pp.226-229.) First, with respect to the admission of Exhibit 19, the video and audio recording of the responding officer’s conversation with the victim, Ms. Clemons, the district court determined that the magistrate correctly concluded Exhibit 19 was properly admitted under the excited utterance

exception to the hearsay rule. (R., pp.227-228.) This exception provides that “[a] statement relating to a startling event or condition made while the declarant is under the stress of excitement caused by the event or condition” is “not excluded by the hearsay rule, even though the declarant is available as a witness.” I.R.E. 803(2). Thus, there are two requirements that must be satisfied in order for this exception to apply: “(1) an occurrence or event sufficiently startling to render inoperative the normal reflective thought process of an observer; and (2) the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought.” State v. Field, 144 Idaho 559, 568, 165 P.3d 273, 282 (2007) (citations omitted). In deciding whether a statement satisfies this exception, the Court considers the totality of the circumstances including “the lapse of time between the startling occurrence or event and the statement, the nature of the occurrence or event, the condition of the declarant, the presence or absence of self-interest when the statement was made, and whether the statement was volunteered or made in response to a question.” State v. Parton, 154 Idaho 558, 564, 300 P.3d 1046, 1052 (2013) (citation omitted).

Although Exhibit 19 is included in the record on appeal, because the trial transcript is not included, the record is inadequate to review whether the district court correctly concluded the I.R.E. 803(2) requirements were met in light of the totality of the circumstances that must be considered. The exhibit itself only provides limited information in that regard, but the information it does reveal regarding the circumstances surrounding the statements on Exhibit 19 supports

the district court's conclusion that the magistrate did not err in admitting the exhibit.<sup>2</sup>

With respect to the magistrate's admission of the audio of the 911 call (Exhibit 20), the district court concluded that the magistrate did not err in admitting the exhibit (R., pp.228-229). According to the district court, the magistrate found Exhibit 20 was admissible (presumably over a hearsay objection) under the present sense impression and excited utterance exceptions to the hearsay rule. (R., p.228.) However, on intermediate appeal, Paoli argued, as he does now, that the exhibit was not admissible under I.R.E. 803(3), which governs a "[t]hen existing mental, emotional, or physical condition." (R., p.194; Appellant's Brief, p.5.) As presumably correctly noted by the district court, "Since the magistrate did not conclude that Ms. Clemons' statements in the audio recording of the 911 call were admissible under I.R.E. 803(3) . . . , the court need not address this alleged error." (R., p.228.) The same conclusion would be true for this Court as there is no basis for finding error in a ruling the court never made.<sup>3</sup>

Although Paoli did challenge the admission of Exhibit 20 as an excited utterance, I.R.E. 803(2), he did not actually challenge the alternative basis for its

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<sup>2</sup> The lack of a trial transcript also prevents the Court from ascertaining the scope and nature of Paoli's objection. The court minutes do not shed any light on this issue; the minutes only indicate trial counsel "comments re: objections to admission of audio & video recordings." (R., p.86 at 10:45:20.)

<sup>3</sup> Although Paoli uses the phrase "present sense impression," he does not cite or discuss the applicable rule relating to that exception – I.R.E. 803(1). (Appellant's Brief, p.5.)

admission as a present sense impression under I.R.E. 803(1). (R., p.194; Appellant's Brief, p.5.) This Court could, therefore, affirm on the unchallenged basis. State v. Goodwin, 131 Idaho 364, 366, 956 P.2d 1311, 1313 (Ct. App. 1998) (where a basis for a ruling by a district court is unchallenged on appeal, appellate court will affirm on the unchallenged basis).

This Court can also affirm the district court's ruling in relation to the admission of Exhibit 20 as an excited utterance for two reasons. First, Paoli has failed to provide any specific argument discussing Exhibit 20 within the framework of I.R.E. 803(2), including the applicable circumstances relevant to a determination of whether the statements on the 911 call satisfied the excited utterance exception. Instead, Paoli only argues: "As with the audio/video recorded by Officer Rose, the 911 call was made after the event occurred. For the reasons stated above, the Trial Court erred in admitting the audio of the 911 call as an excited utterance." (Appellant's Brief, p.5 (capitalization original).) That the statements made on the 911 call were "made after the event occurred" does not mean the statements do not qualify as excited utterances. A proper argument must address the totality of the circumstances surrounding the statement including "the lapse of time between the startling occurrence or event and the statement, the nature of the occurrence or event, the condition of the declarant, the presence or absence of self-interest when the statement was made, and whether the statement was volunteered or made in response to a question." Parton, 154 Idaho at 564, 300 P.3d at 1052. Since the 911 call preceded Ms. Clemons' conversation with Officer Rose, the analysis of the two



sets of statements is not exactly the same – especially as to the “lapse of time” and “condition of the declarant” factors. Paoli’s reliance on his “argument” in relation to the officer’s audio/video recording (Exhibit 19) as his argument in relation to the 911 call (Exhibit 20) is inadequate to satisfy the requirement that he support each of his claims with argument. See Murray, 156 Idaho at 168, 321 P.3d at 718.

Second, even if Paoli’s excited utterance “argument” is adequate, he has failed to explain why the district court erred in affirming the magistrate’s admission of the 911 call on this basis. (Appellant’s Brief, p.5.) According to the district court, “the magistrate concluded that Ms. Clemons’ statements in the 911 call fit within the excited utterance exception to the hearsay rule” because “Ms. Clemons made the 911 call immediately after her altercation with Mr. Paoli, and the tone of her voice on the audio recording showed that she was still under the stress of excitement caused by the altercation.” (R., p.229 (quoting “Trial Tr. 116:4-8”).) Paoli identifies no specific error by the district court in this ruling. (Appellant’s Brief, p.5.) Moreover, although the audio of the 911 call (Exhibit 20), is included in the record on appeal, the trial transcript is not. Like the officer’s audio/video (Exhibit 19), the audio of the 911 call (Exhibit 20) only provides limited information with respect to the excited utterance analysis, but the information it does reveal regarding the circumstances supports the district court’s conclusion that the magistrate did not err in admitting Exhibit 20.

As with his jury instruction complaint, Paoli’s complaints about the magistrate’s evidentiary rulings are framed as trial court error without any

argument as to why he believes the district court erred (Appellant's Brief, pp.3-5), which is the decision this Court is reviewing on appeal. DeWitt, supra. Having failed to articulate any error by the district court, having failed to provide the trial transcript, and having failed to address all relevant grounds for admission of one of the challenged exhibits, Paoli has failed to demonstrate error in the district court's intermediate appellate decision affirming the magistrate's evidentiary rulings. See Murray, supra; Fritts, supra.

### III.

#### Paoli Has Failed To Articulate Any Basis For Finding Error In The District Court's Refusal To Consider His Ineffective Assistance Of Counsel Claims For The First Time On Appeal

Paoli presents the same ineffective assistance of counsel claims on this appeal that he raised on intermediate appeal – that trial counsel was ineffective for “[f]ailing to obtain color copies of the photographs used as exhibits prior to trial,” and for “show[ing] his inexperience during closing argument” by saying, “We say these things in the name of Jesus – sorry. Different talk – time.” (R., p.195; Appellant's Brief, p.6.)

The district court, quoting State v. Pentico, 151 Idaho 906, 265 P.3d 519 (Ct. App. 2011), and State v. Doe, 136 Idaho 427, 34 P.3d 1110 (Ct. App. 2001), declined to consider Paoli's ineffective assistance of counsel claims for the first time on appeal, correctly noting such claims “are more appropriately presented through a post-conviction relief proceeding where an evidentiary record can be

developed.”<sup>4</sup> (R., pp.229-230.) Rather than address the district court’s decision and its reasons for declining to consider the merits of Paoli’s ineffective assistance of counsel claims, Paoli just repeats the same arguments he made to the district court. (Compare R., p.195 with Appellant’s Brief, p.6.) Because Paoli has not challenged the district court’s actual ruling, there is no basis for reversal, and this Court should affirm the district court’s decision with respect to Paoli’s ineffective assistance of counsel claim. Goodwin, 131 Idaho at 366, 956 P.2d at 1313 (where a basis for a ruling by a district court is unchallenged on appeal, appellate court will affirm on the unchallenged basis). Moreover, without the trial transcript, it is impossible to evaluate Paoli’s complaints about trial counsel’s performance.

Paoli has failed to identify, much less establish, any error in the district court’s intermediate appellate decision. The district court’s appellate opinion should, therefore, be affirmed.

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<sup>4</sup> Although one of the grounds for Paoli’s motion for a new trial was ineffective assistance of counsel, the nature of that allegation is not contained in the record, nor did Paoli appeal the denial of his motion for new trial. (See R., pp.117-118 (motion for new trial), 189-196 (intermediate appellant’s brief).)

### CONCLUSION

The state respectfully requests that this Court affirm the district court's intermediate appellate decision that affirmed Paoli's conviction for domestic battery and destruction of a telecommunications instrument.

DATED this 7th day of November, 2016.

/s/ Jessica M. Lorello  
JESSICA M. LORELLO  
Deputy Attorney General

### CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 7th day of November, 2016, served two true and correct copies of the foregoing BRIEF OF RESPONDENT by placing the copies in the United States mail, postage prepaid, addressed to:

CLAYNE S. ZOLLINGER, JR.  
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/s/ Jessica M. Lorello  
JESSICA M. LORELLO  
Deputy Attorney General

JML/dd